JOINT DEVELOPMENT OF POTASH AND OIL AND GAS RESERVES; THE TENTH CIRCUIT DEFERS TO THE IBLA RATHER THAN TO BLM

By
Stuart R. Butzier
Modrall, Sperling, Roehl, Harris & Sisk, P.A.

The Tenth Circuit's March 16, 2000 decision in IMC Kalium Carlsbad, Inc. v. Interior Board of Land Appeals, et al., weighs in on the side of oil and gas developers in their long-standing dispute with potash interests over certain leasing opportunities on public lands in southeastern New Mexico. In the process, the court clarified whether, under the Administrative Procedures Act, courts are to pay deference to decisions of the Bureau of Land Management ("BLM") where a separate appellate level decision is reached by the Interior Board of Land Appeals ("IBLA") within the Department of Interior. According to the Tenth Circuit, judicial deference is properly paid to the IBLA, not BLM, and the court's review standard does not change just because the IBLA arrived at a different result than BLM when it reviewed BLM's decision *de novo*.

The case arose from BLM's 1992 competitive auction of a potash lease for public lands containing both potash and oil and gas reserves. Two oil and gas companies, Yates Petroleum Corp. and Pogo Producing Co. ("Yates/Pogo"), jointly submitted the highest bid for the potash lease after BLM had failed to approve their applications for permit to drill oil and gas wells in the same area on the basis that the proposed wells were in potash ore zones and could lead to waste of potash.[(1)] Noting conflicting statements of Yates/Pogo regarding whether they would seriously attempt to develop the potash, BLM subsequently rejected Yates/Pogo's bid for the potash lease on the basis that it was made in bad faith. BLM instead awarded the potash lease to the second highest bidder, IMC Kalium Carlsbad, Inc. ("IMC"), a potash company with existing operations in the same basin.

The IBLA reversed BLM in Pogo Prod. Co., 138 I.B.L.A. 142 (1997). The IBLA found that the record did not disclose "a rational basis for the rejection" of Yates/Pogo's bid. IMC then brought suit in federal district court, which gave deference to BLM in reversing the IBLA on the grounds that "[t]he record provides ample evidence to support BLM's rationale for rejecting [Yates/Pogo's] highest bid." IMC Kalium Carlsbad, Inc. v. Babbitt, 32 F. Supp. 2d 1264, 1276-77 (D. N.M. 1999). Yates/Pogo then appealed the district court's decision to the Tenth Circuit Court of Appeals.

The Tenth Circuit reversed the district court in its March 16, 2000 opinion. According to the Tenth Circuit, the district court erred in paying deference to the BLM. Instead, deference should be paid to the IBLA as the body voicing the final decision of the agency, i.e., the Department of the Interior. The IBLA properly conducted a *de novo* review of BLM's decision and was entitled to draw reasonable inferences from the evidence.

According to the Tenth Circuit, there was substantial evidence in the record before the IBLA to support the findings that Yates/Pogo's bid was not made in bad faith, and that

there would be no undue waste of potash. Specifically, the IBLA could reasonably infer - from Yates/Pogo's express goal of "pursuing the profitable development of both oil and gas and potash" and from the difference in timing of the alleged contradictory statements - that Yates/Pogo was not bidding in bad faith. Further, according to the court, the mere fact that a Yates/Pogo consultant differed with BLM on whether certain of the potash zones were commercially viable "does not mean that those zones will be wasted should [Yates/Pogo] be awarded the lease."

Thus, the Tenth Circuit's decision has significance on both substantive and procedural levels. First, from the oil and gas developers' perspective, the decision provides some comfort in the face of a frustrating BLM policy that arguably favors potash developers in the basin in question; the decision acknowledges oil and gas developers' rights to participate in the potash leasing process and conduct its own analyses to determine the commercial viability of potash reserves in the area. Second, the Tenth Circuit has clarified that, in appeals from the IBLA, courts must give any due agency deference to the IBLA and not to a division within Interior (such as BLM in this case); such is true even where the IBLA decision reversed the front-line decision.

At least as of this writing, no petition for writ of certiorari to the United States Supreme Court has been filed. If the seesaw history of this case is any indication, however, it may be reasonable to assume that IMC will seek a final review if no settlement is achieved in the interim. Meanwhile, the Tenth Circuit may provide Yates/Pogo with certain collateral benefits in pending appeals from the denials of APDs in the area.

1. In a 1986 Order, the Secretary of Interior had established a policy of protecting correlative rights in the basin at issue, and in that context had clarified that the Department generally would "deny approval of most applications for permits to drill oil and gas test wells from surface locations within the potash enclaves" where potash ore is economically and technically feasible. See Oil, Gas & Potash Leasing and Development Within the Designated Potash Area of Eddy & Lea Counties, New Mexico, 51 Fed. Reg. 39,425 (1986). Yates/Pogo has an ongoing dispute with BLM over the feasibility of certain potash zones, and part of Yates/Pogo's original motivation to bid on the potash lease apparently was to gain access for further feasibility study by their own consultants.